

**THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

**Case Number: 32217/2019**

Reportable: No  
Of interest to other judges: No  
Revised: Yes

In the matter between:

**AMA CASA PROPS 129 (PTY) LIMITED**

**Applicant**

And

**THE CITY OF JOHANNESBURG**

**First Respondent**

**CITY POWER SOC LIMITED**

**Second Respondent**

**JOHANNESBURG WATER SOC LIMITED**

**Third Respondent**

**HERMAN MASHABA**

**Fourth Respondent**

**NDIVHONISWANI LUKHWARENI**

**Fifth Respondent**

**EXECUTIVE MAYOR: CITY OF JOHANNESBURG:**

**HERMAN MASHABA N.O. (CITED IN HIS**

**NOMINAL CAPACITY AS SUCH)**

**Sixth Respondent**

**CITY MANAGER: CITY OF JOHANNESBURG**

**NDIVHONISWANI LUKHWARENI N.O.**

**(CITED IN HIS NOMINAL CAPACITY)**

**Seventh Respondent**

*Municipal rates and service charges, prescription thereof, the municipality's obligation to render accurate accounts, the municipality's duties in litigation.*

## Judgment

**DE VILLIERS, AJ:**

### **Introduction**

[1] The applicant is a property owner of a property that falls in the jurisdiction of the respondent, the City of Johannesburg. It is a commercial development at the Bruma Lake, that the applicant intends to redevelop. The remainder of the respondents are all linked to the City of Johannesburg:

[1.1] The second respondent is City Power (SOC) Ltd, wholly owned by the municipality, and used by the municipality as a vehicle to deliver electricity to ratepayers;

[1.2] The third respondent is Johannesburg Water (SOC) Ltd, wholly owned by the municipality, and used by the municipality as a vehicle to deliver water to ratepayers;

[1.3] The fourth and sixth respondents (in personal and official capacities respectively) is Mr Herman Mashaba, at the time when the application was launched, the mayor of the City of Johannesburg;

[1.4] The fifth and seventh respondents (in personal and official capacities respectively) is Mr Ndivhoniswani Lukhwareni, at the time when the application was launched, the city manager the City of Johannesburg.

[2] I refer in this judgment to “*the municipality*” without making a distinction between the City of Johannesburg, City Power (SOC) Ltd, or Johannesburg Water (SOC) Ltd in that reference. The only relief sought was against the municipality (in this wider meaning). In the end, no relief was sought against Mr Mashaba and Mr Lukhwareni in any capacity.

[3] In essence, the applicant seeks an order compelling the municipality to properly account for municipal rates and service charges in respect of the property in issue, and to address the queries raised by the applicant about its billing for service

charges. As such, the applicant sought that an order be granted that included declaratory relief, an order that certain entries on its accounts be reversed, an order that the municipality must produce certain documents. The applicant also sought an order that the municipality must reconnect the electricity supply to the property and must rectify the valuation of the property in terms of an agreement on valuation. In addition, the applicant seeks an order for an interim interdict against municipal service discontinuation whilst the disputes are resolved. The applicant sought penalising costs.

### **The facts**

[4] The facts are simple. Upon reading the founding affidavit, the following emerged as uncontested facts, or facts met with inappropriate bald and/or uncreditworthy denials in answering papers:

[4.1] The main property in issue is Portion 1 of Erf [...] Cyrildene (*“the property”*), being the property where the municipality installed the water and electricity meters in issue and supplied water and electricity to the erf and to three adjacent properties also owned by the applicant. The four properties are treated as one property for municipal valuation and billing purposes. The additional three properties are Portion 1 of Erf [...] Bruma, Portion 1 of Erf 139 Bruma, and Remaining Extent of Erf 138 Bruma. They play only a peripheral role in how the parties approached the matter;

[4.2] In about 2002 Blaizepoint Trading 380 CC became the owner of the property;

[4.3] In about 2005 Zelpy 2095 (Pty) Ltd became owner of the property;

[4.4] Before the applicant could become the owner of the property, the municipality issued so-called clearance figures on or about 1 February 2015 for an amount of R2 979 819.01. This was in respect of the alleged indebtedness of Zelpy 2095 (Pty) Ltd to it;

[4.5] The applicant paid this amount in order to obtain transfer of the property, and did so on about 16 February 2015;

[4.6] On 11 March 2015 the applicant became owner of the property. This date is more than three years ago, but less than thirty years;

[4.7] The municipality bills the applicant through a certain account number, [...] ("*the account*"), and for a reason not explained in the papers, it renders two statements/invoices every month. The one statement/invoice contains charges for electricity consumption, and the other statement/invoice contains rates, water consumption charges, sewerage charges, refuse charges, and any other sundry charges;

[4.8] The property (a commercial property) has been vacant and/or sparsely occupied for some years after the municipality disconnected electricity supply thereto on about 5 February 2018. This date is more than three years ago;

[4.9] This disconnection, according to the termination notice, was for a debt of a previous owner, Blaizepoint Trading 380 CC. In its answering affidavit the municipality merely noted this fact, and therefore admitted it;<sup>1</sup>

[4.10] The above termination notice reflected a debt of R6.1 million, of which R3.5 million was allegedly outstanding for more than 90 days;

[4.11] All attempts by the applicant to have its electricity supply restored, have failed;

[4.12] The electricity meter number in issue is [...]. After the disconnection, the municipality did not supply electricity to the property, thus could not have metered charges therefor, and instead billed the applicant for alleged estimated use. The estimated use was not R Nil, as it as a matter of logic should have been in a property without electricity supplied to it. In the period 17 May 2018 to 7 March 2019 the municipality billed the applicant R2 503 338.19 as estimated use. I do not know what amounts were added thereto, if any, after the papers were issued on about 22 October 2019;

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<sup>1</sup> Makhuva and Others v Lukoto Bus Service (Pty) Ltd and Others 1987 (3) SA 376 (V) at 386E-G

[4.13] The municipality does make water available to the property. It is common cause that the meter, [...], has been faulty since before 22 May 2018 and has been reported as such. The meter has been tested by the municipality, but the municipality has not provided the applicant (or the court) with the outcome of the enquiry;

[4.14] In the period when there was no, or hardly any, occupation of the property, the municipality charged the applicant for estimated water use. In the period 1 July 2018 to 11 February 2019 the estimated use of water was billed as R423 983.69. Due to the vacancy of the property, the amount should have been a minimal amount, if anything. There were some reversals on the account, but the current debt remains at R389 446.82. I do not know what amounts were added thereto, if any, after the papers were issued on about 22 October 2019;

[4.15] The applicant has lodged a formal query with the municipality under query number 800394602 acknowledged on 6 June 2018 with regard to its alleged electricity and water usage (*"the query"*). It remains unresolved;

[4.16] The last dispute is about rates. The applicant objects to the latest valuation of the property (including the other three properties) on 5 April 2018 of R39.675 million. The municipality considered the objection and seemingly on 5 April 2018 agreed that the valuation should have been R15 million and that this corrected valuation would take effect on 1 January 2013. In practical terms one of the four properties would be so valued, and the rest would be valued as R Nil;

[4.17] The municipality failed to implement the agreed valuation (or explain it), failed to give credit in respect of rates levied on the incorrect valuation, and by June 2019 still calculated rates on a value of R39.675 million, more than double the agreed valuation;

[4.18] The applicant over the years have endeavoured to engage the municipality to rectify its accounts, amongst others, in writing on 25 May 2018, 30 January 2019, and 1 March 2019. I have seen no meaningful

response thereto. The municipality also has not reacted to a letter of demand dated 25 June 2019; and

[4.19] The municipality's obligation to provide the applicant with basic municipal services such as water, sewerage, refuse removal and electricity, has not been in issue.

### **Being a model litigant**

[5] The approach by the municipality to this litigation compels me to make a few remarks. Before I address the obligations of a municipality in litigation, I first address its bureaucratic obligations to provide context to its duties in litigation in this instance.

[6] Without any laws on our books, society would have expected that a municipality must accurately bill ratepayers. It is obviously the right thing to do. Adding a law imposing such an obvious, normative obligation as a legal obligation too, did occur as well. See section 95(d) to (g) of the of the Local Government: Municipal Systems Act 32 of 2000 ("*the Systems Act*" and underlining added):

#### **"95 Customer care and management**

In relation to the levying of rates and other taxes by a municipality and the charging of fees for municipal services, a municipality must, within its financial and administrative capacity-

...

(d) where the consumption of services has to be measured, take reasonable steps to ensure that the consumption by individual users of services is measured through accurate and verifiable metering systems;

(e) ensure that persons liable for payments, receive regular and accurate accounts that indicate the basis for calculating the amounts due;

(f) provide accessible mechanisms for those persons to query or verify accounts and metered consumption, and appeal procedures which allow such persons to receive prompt redress for inaccurate accounts;

(g) provide accessible mechanisms for dealing with complaints from such persons, together with prompt replies and corrective action by the municipality;

...

[7] Apart from the Systems Act, there are further legislated obligations on a municipality to render accounts to ratepayers, being those set out in section 64(2)(c) of the Local Government: Municipal Finance Management Act 56 of 2003 (*“the Municipal Finance Management Act”*).<sup>2</sup> Implicit therein is that the accounts must be accurate.

[8] It would cause little surprise that the duty to render accurate accounts is also contained in section 10(a) of the municipality’s Credit Control and Debt Collection Bylaws, 2004.<sup>3</sup> In addition, in terms of section 11 of the bylaws, the municipality must deal with billing queries efficiently (and thus remove the need for litigation to resolve disputes). The municipality must investigate the query on the account and provide the consumer with written reasons why the charges are payable within 14 days. The consumer would then have the option in terms of section 12 of the bylaws to appeal

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<sup>2</sup>“ 64 Revenue management

(1) The accounting officer of a municipality is responsible for the management of the revenue of the municipality.

(2) The accounting officer must for the purposes of subsection (1) take all reasonable steps to ensure-

- (a) that the municipality has effective revenue collection systems consistent with section 95 of the Municipal Systems Act and the municipality’s credit control and debt collection policy;
- (b) that revenue due to the municipality is calculated on a monthly basis;
- (c) that accounts for municipal tax and charges for municipal services are prepared on a monthly basis, or less often as may be prescribed where monthly accounts are uneconomical;
- (d) ...”

<sup>3</sup> “10. Account administration

The Council must, subject to the provisions of section 5, endeavour to ensure —

- (a) accurate metering of consumption at fixed intervals with the minimum delay between service connection and first and subsequent rendering of accounts;
- (b) accurate and up-to-date information in accounts;
- (c) accurate monthly accounts with the application of the appropriate and correct prescribed fees, rates and other related amounts due and payable;
- (d) the timely dispatch of accounts;
- (e) ...”

Section 5 addresses estimated consumption billing:

“5. Estimated consumption

The Council may have an estimate made of the consumption of water or electricity for any relevant period if —

- (a) no meter reading could be obtained in respect of the period concerned; or
  - (b) no meter has been installed to measure the consumption on the premises concerned,
- and the customer concerned is liable for payment of the prescribed fee in respect of such estimated consumption.”

such a decision reached. The intent clearly is that these matters should be resolved administratively. In this case, the process failed the applicant.

[9] The obligation on a municipality to render accurate accounts to ratepayers has a Constitutional basis too. In every sphere of government, government must apply the principles of the Constitution, which in terms of section 195(1) includes the obligation of providing timely, accessible and accurate information, the obligation duty to respond to people's needs, and the obligation to provide services fairly. Need I point out that the obligation to comply with statutory and constitutional obligations to render say accurate accounts give effect to the constitutional value of the supremacy of the Constitution and the Rule of Law (sections 1 and 2 of the Constitution)?

[10] The largest city in South Africa did not seek to convince me that it is not within its financial and administrative capacity to render accurate accounts to ratepayers. The facts of this matter are that the municipality's accounts are clearly inaccurate. I thus do not address this judgment the degree of accuracy required. I also accept that there are instances where a municipality may have to estimate consumption charges (as opposed to metered charges), and I do not seek to address what those circumstances are in this judgment. I also do not seek to address how close to accurate such estimates of consumption must be. I need not do so as I have illustrated in the summary of the facts that the estimates in this matter bore no resemblance to actual use.

[11] Reverting to the facts of this matter. In essence, in issue is an accounting matter and the alleged failure by the municipality to comply with its obligations to render accurate accounts. In this matter that failure impacts on the supply of the electricity to the property, may impact on the supply of water to the property, and impacts on the applicant's ability to pay what is due. It is no trifling dispute.

[12] Assuming that a municipality believes that its accounts are accurate, or that an applicant must pay inaccurate accounts for some legal reason, how should it approach an application of this nature? There is no doubt that a municipality has a higher duty as a litigant. It has a duty to address the real issues raised by a ratepayer, honestly, fairly, and properly. We may not have the equivalent of promulgated model litigant guidelines (or need them so named), but we already



embraced those principles in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* 2019 (4) SA 331 (CC) at paragraph 60 (underlining added):

“This Court has repeatedly stated that the state or an organ of state is subject to a higher duty to respect the law. As Cameron J put it in *Kirland*:

‘[T]here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly.’<sup>4</sup>

[13] In a very useful article, “*The Government as Litigant*”,<sup>5</sup> the author discusses the model litigant obligations in Australia. The article referred me to *Melbourne Steamship Co Ltd v Moorehead* [1912] HCA 69 where Griffith CJ stated:

“... The point is a purely technical point of pleading, and I cannot refrain from expressing my surprise that it should be taken on behalf of the Crown. It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and a *fortiori* not in criminal proceedings. I am sometimes inclined to think that in some parts - not all - of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.”

[14] I agree with the Honourable Griffith CJ. I am not suggesting that in no case a municipality may adopt a technical defence, but it is not a step to be taken lightly. See too *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC) at paras 42; 78-81; and 89-90 with regard to matters a municipality may have to consider before adopting a technical defence. The point is that there is a heightened

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<sup>4</sup> *Member of the Executive Council for Health, Eastern Cape v Kirland Investments (Pty) Limited t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) at para 82.

<sup>5</sup> Appleby, G, “*The Government as Litigant*” (2014) 37(1) UNSW Law Journal 94.

duty on the municipality to address the real issues raised by (in this case) a ratepayer, honestly, fairly, and properly. It must do right, and it must do it properly. This also means that a municipality in a case such as the one under consideration, must evaluate the matter on receipt of the papers, and decide if the dispute needs to be resolved between the attorneys, or taken to court at significant expense.

### **Overview of defective answering papers and attempt to supplement**

[15] The whole of the answering affidavit, which included no annexures, comprised nine pages only. It is in some cases possible to answer succinctly, but the nine pages were not a proper attempt to address the issues raised in the Notice of Motion, Founding Affidavit (38 pages), and annexures (113 pages). It contained several instances where averments were “*noted*” and thus admitted.<sup>6</sup> It raised no issues, other than bald denials and bald assertions, unsubstantiated by fact, law, or reasoning, all based on an assurance of personal knowledge of the deponent and his access to the records of the municipality. In the terse answering affidavit, a legal advisor, Mr Tuwani Ngwana stated, that he has personal knowledge of the matter, and that he has “*direct and unlimited access to the records kept by the First, Second and Third Respondents*” (this version he would later deny in a supplementary answering affidavit).

[16] Arising from his alleged knowledge of the matter, Mr Ngwana:

[16.1] Baldly denied that there was even a dispute about the municipality’s charges: “*The Respondents deny that there is dispute in respect of the charges rendered.*” (He made no attempt to address the proof provided by the applicant of the dispute, which included the reference numbers of the query, its letters, and even the fact of the litigation);

[16.2] Baldly stated: “*The Respondents deny that they levied the Applicant inaccurate municipal charges*”, and he stated: “*The Respondents continues to render accurate statement to the Applicant for consumption of water, electricity and other municipal services.*” (I have already shown that the estimated electricity consumption should have been R Nil, and that the

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<sup>6</sup> See the earlier reference to the *Makhuvu* judgment.

estimated water consumption charges at least *prima facie* seems problematic as the property in essence is vacant);

[16.3] Did admit that “some” but unidentified claims by the municipality were not metered expenses, but were estimated electricity charges: “*Save to admit that there were some estimate charges in this regard the Respondents shall attend to reconcile the accounts herein and where necessary render revised invoices.*” Mr Ngwana did not identify which of the expenses were metered, or why, and again baldly stated: “*Save to deny that the Respondents failed to take readings for water meter for an extended and unreasonable period of time, ...*”. (As will be seen below, on the evidence before him, there could not have been metered electricity charges for more than the last three years, and it ought to have been common cause that the water meter has been faulty for more than three years);

[16.4] Baldly denied that the applicant was being held liable for debts that were due by its predecessors-in-title: “*Save to deny that the Respondent are charging the Applicant debts of the previous owner ...*” (This version he advanced in the face of the municipality’s termination notice).

[17] Even without accepting that there is a heightened duty that rests on the municipality in conducting litigation to address the real issues raised by (in this case) a ratepayer, honestly, fairly, and properly, the answering affidavit did not come close to the standards set out in leading cases on pleading and proving a case in motion proceedings. Leaving aside the obligation to plead legal defences, no attempt was made to put forward primary or secondary facts in conflict with the applicant’s case, and the limited attempts consisted of hearsay evidence without a basis being laid for the admission of such evidence. The law is clear as to the consequences of affidavits containing bald and hollow denials, and untenable versions. See *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another* 2011 (1) SA 8 (SCA) at para 19-20. In that context, the respondent failed to address seriously and unambiguously any facts alleged by the applicant. The outcome is inevitable, a

finding must be made that the respondent has failed to raise in its answering affidavit any real dispute of fact.<sup>7</sup>

[18] The replying affidavit correctly made the point that the defective answering affidavit did not make out a defence.

[19] Thereafter a supplementary answering affidavit was delivered. I address its admissibility next.

[20] In context, the answering affidavit was deposed to on 9 October 2019, the replying affidavit was delivered on 13 December 2019, detailed heads of argument were served on 5 February 2020 on behalf of the applicant, and the supplementary answering affidavit was only served on 7 February 2020. The municipality knew fully what case it had to meet. Still, the purported supplementary answering affidavit, inclusive of the affidavit seeking leave to supplement the answering affidavit, was a mere 12 pages long. It purportedly was based on new facts having become available. Instead of addressing such new facts, the old version was repeated (often merely copied and pasted), and in very few instances additional issues were raised and/or admissions withdrawn. It was in truth meant as a replacement of the original answering affidavit.

[21] Mr Ngwana explained the need for the further answering affidavit (underlining added):

“3. The facts herein contained fall within my personal knowledge, and are true and correct.

4. I have deposed to answering affidavit in response to the founding affidavit deposed to by JOHN KONSTAS on behalf of the Applicant.

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<sup>7</sup> The leading cases include *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323F-325C, *Choice Holdings Ltd and Others v Yabeng Investment Holding Co Ltd* 2001 (3) SA 1350 (W) at para 34, *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 (C) at para 28, *Fakie v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at paras 55-56, *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at paras 12-13, *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paras 26-27, and *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) at paras 13 and 37.

5. Pursuant to the filing of the answering affidavit and after consulting with other personnel of the Respondents,<sup>8</sup> new information came to light,<sup>9</sup> which was not at hand at the time of disposing to the affidavit.<sup>10</sup> As a result, this new information could not have been placed before the Court when answering affidavit was filed.

6. The information is essential in order for Court to have full understanding of the payment history of the Applicant and its failure to update its records leading to the pre-termination notice being issued under the name of previous owner.

7. ...

8. I submit that the Applicant would not be prejudiced by filing on the supplementary (answering affidavit) as it merely give(s) details to the denials raised in the initial affidavit and where the Respondents did not have knowledge of facts.<sup>11</sup>

9. ...

10. The new information could not be readily obtained as it is logistically difficult to obtain and consult with various stakeholder from different departments of the Respondents to timeously prepare and file the answering affidavit.<sup>12</sup>

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<sup>8</sup> These officials were not identified and no confirmatory affidavits by them were provided.

<sup>9</sup> The municipality and Mr Ngwana thus admit that the version in the original answering affidavit that Mr Ngwana had personal knowledge and access to all of the municipality's records, was at least in part untrue. (I make no finding that it was knowingly advanced as an untruth, as this would require further investigation first, although the further paragraphs quoted cause me further concern.)

<sup>10</sup> The alleged "new" evidence consisted of annexures to the affidavit. Attached to the affidavit were 113 pages of its invoices (which certainly cannot be described as "new" evidence as it would have had such documents available to it) and one page that seems to be an extract from its accounting system (which certainly also cannot be described as "new" evidence). If the deponent did not even have access to accounting records to when he deposed to the answering affidavit, what records did he have access to?

<sup>11</sup> The municipality and Mr Ngwana thus admit to a raising purported disputes of fact without any basis for such a stance in the original answering affidavit. In my view this does not comply with the duties of the municipality in litigation. (I restrain comments on how the blame should be apportioned, as I do not know what role other senior officials and lawyers played in preparing the original answering affidavit and deciding on litigation tactics.)

<sup>12</sup> This statement raises serious concerns. If time is needed by a large organisation to prepare an answering affidavit as documents needed to be accessed, time should be sought, or at least the answering affidavit

11. I could not have accessed the new information on the system on my own and I needed assistance of other personnel from the Respondents and same was obtained on/or about 13 January 2020, and was only able to consult with the Respondents attorneys of records on 17 January 2020, to prepare this supplementary affidavit.

[22] The alleged “new” matters the municipality sought to introduce were limited:

[22.1] The one matter that is addressed in more detail was if there was a prior communication before the electricity supply was terminated. Even if the version was admissible evidence (and not clearly inadmissible hearsay evidence), it is irrelevant in this matter;

[22.2] The new version addressed was that, although the electricity termination notice reflected the detail of a previous owner, and although on the municipality’s version this was so as the applicant failed to inform the municipality as to a change in ownership, somehow the municipality only billed the applicant for electricity consumed by it (albeit under the wrong name) and not for electricity consumed by a previous owner as well. No facts were advanced or proven for this defence. Even if the version was admissible evidence (and not clearly inadmissible hearsay evidence), it is irrelevant in this matter as all metered electricity charges has become prescribed (as addressed more fully later herein), and as the estimated consumption charges thereafter should have been R Nil;

[22.3] A further version was raised; the applicant has failed to pay the (incorrect) amounts claimed by the municipality. Attached to the affidavit is about 113 pages of invoices showing that the applicant has not paid the incorrect rates and charges. But it is all irrelevant in this matter. Clearly the applicant must pay corrected accounts. It has not been suggested that it will refuse to make such payment, and my order will take its obligation to make payment into account; and

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should state that the deponent lack personal knowledge, and may seek leave to supplement the papers. A version cannot be advanced that the deponent has access to the municipality’s records and is able to depose to an affidavit from the facts contained in those inaccessible records, only later to contradict that version.

[22.4] Issue is taken with the compliance with the procedure to test the water meter. Mr Ngwana admits that the applicant applied that the water meter be tested, but argued that the applicant had to make a certain payment first in terms of a procedure (of unspecified origin)<sup>13</sup> for the test to be completed, and that it failed to make such payment. It was baldly alleged that a quotation was issued by someone in some manner for an unspecified amount,<sup>14</sup> and the applicant failed to make the payment. Hence (whilst knowing that the meter was faulty), the municipality did not attend to the matter and continued to raise incorrect estimates for water usage. Even if the version was admissible evidence (and not clearly inadmissible hearsay evidence), it was so baldly pleaded that it failed to raise an issue for determination.

[23] *Porterstraat 69 Eiendomme (Pty) Ltd v P A Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C) at 617B-F and the cases referred to by the learned judge dealt with the factors to take into account in refusing a further affidavit. Adapting some of the factors mentioned there (and as evident from my earlier comments), I took into account the weak explanation why the evidence was not delivered timeously. More strongly put, in my view it would be an injustice to allow the municipality leave to supplement its answering affidavit in this case where its condensed version is that it did not play open cards with court in its first attempt. This should have been explained. Courts and the obligations of a municipality as a litigant, must be respected and not toyed with. I further took into account the lack of materiality of the evidence then tendered (as discussed above), the consequent lack of prejudice to the respondent if the affidavit were excluded, and the failure by the municipality to tender the wasted costs. I also have not been told who is to blame for the laconic papers, or why admissions were sought to be withdrawn. For all I know it was a deliberate litigation strategy to deliver the laconic papers and the shoe later pinched. I took into account that the applicant, “*to save time and costs*”, did not oppose the receipt of the further affidavit. In the end, it is for the court to grant or refuse leave for the answering affidavit to be supplemented with a fourth affidavit. See Uniform Rule

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<sup>13</sup> “The procedure that is followed when the customer request for meter testing is as follows: ...”

<sup>14</sup> “In this case the quotation was issued to the Applicant for payment before the testing can be actioned.”

6(5)(e). I decline to do so and I refuse leave for the further answering affidavit to be admitted into evidence.

[24] Despite my criticism of the unhelpful answering affidavits, I have not lost sight of the question if the applicant has alleged and proven its case. If it bore the onus and failed to allege and prove a case, that the other party must succeed. In some cases, that may be done by examining the founding affidavit only. See *Valentino Globe BV v Phillips and Another* 1998 (3) SA 775 (SCA) at 779E-780C. A bona fide dispute of fact as to a defence will thwart the applicant, no matter the onus. It is often said with regard to *National Director of Public Prosecutions v Zuma*, 2009 (2) SA 277 (SCA) at paras 26-27, that onus plays no role in opposed motion proceedings for final relief in the context of conflicting factual versions. Hence as was summarised in *Zuma* at para 26 (footnote omitted):

“... It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.  
...”

[25] It was held in *Ngqumba en 'n Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 262B-C that the rule in *Plascon-Evans*<sup>15</sup> applies even where the onus in a matter is on the respondent. However, where an onus rests on the respondent, and the respondent fails to allege and prove a defence, judgment ought to follow (leaving aside any request for a referral to oral evidence or trial by the respondent as it needs that procedure to access evidence). Similarly, if the defence in such a case is to be rejected as being one based on bald or uncreditworthy denials, fictitious disputes of fact, palpably implausible, far-fetched or clearly untenable, purported factual disputes, judgment must follow. In this case the

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<sup>15</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).



municipality bears an onus to prove the correctness of the municipal charges (*Euphorbia (Pty) Ltd t/a Gallagher Estates v City of Johannesburg* [2016] ZAGPPHC 548 at paras 10 and 17). Had it raised such facts, the enquiry in opposed motion proceedings is not if it discharged the onus on a balance of probabilities, but if there is a real dispute of fact.

### **The legal position**

[26] In order to address the attempt to supplement the answering affidavit, I have already referred to section 95(d) to (g) of the Systems Act, section 64(2)(c) of the Municipal Finance Management Act, various sections in the municipality's Credit Control and Debt Collection Bylaws, 2004, and sections in the Constitution. Next, I address the law in more detail and to apply it to the facts and the relief sought.

[27] No property is transferred without the previous owner (or someone on his/her behalf) having paid the rates, taxes and service charges due to the municipality. It is slightly more complicated than this, as the municipality may only prevent transfer until paid the "*municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties* (that became due) *during the two years preceding the date of application for the certificate*". See section 118(1)(b) of the Systems Act.<sup>16</sup> The applicant is not, merely as a property owner, liable for the debts of its predecessors-in-title. A Constitutional Court judgment informed municipalities that they cannot recover from the new owner the charges on the property incurred by the previous owner before registration of transfer and not recovered from that owner: *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others* 2017 (6) SA 287 (CC). It is now without doubt that the applicant is not liable to the municipality for rates, taxes and service charges incurred whilst the property was owned by its predecessors-in-title. In this case the date of transfer was 11 March 2015.

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<sup>16</sup> "118 Restraint on transfer of property

(1) A registrar of deeds may not register the transfer of property except on production to that registrar of deeds of a prescribed certificate-

- (a) issued by the municipality or municipalities in which that property is situated; and
- (b) which certifies that all amounts that became due in connection with that property for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties during the two years preceding the date of application for the certificate have been fully paid."

[28] In terms of section 11(a)(iii) of the Prescription Act 68 of 1969, the period of prescription of “*any debt in respect of any taxation imposed or levied by or under any law*” is 30 years. When is a debt to a municipality taxation as contemplated in the Prescription Act? It has never been in contention that rates amount to taxation for the purposes of the Prescription Act. It has long been a vexed question what the position is with regard to charges for municipal services. The arguments take into account the composition of such charges (taking into account matters such as costs of procurement, infrastructure costs and tariffs), sliding scale tariffs, sections 156(1)(a) and 229(1) of the Constitution, read with Part B of Schedule 4 and Part B of Schedule 5 thereof; section 4(1)(c) of the Systems Act, and various judgments that dealt with the question of when a charge is a tax: *South African Reserve Bank and Another v Shuttleworth and Another* 2015 (5) SA 146 (CC) at para 52, *Permanent Estate and Finance Co, Ltd v Johannesburg City Council* 1952 (4) SA 249 (W) at 258H-259B, and *Randburg Management District v West Dunes Properties 141 (Pty) Ltd and Another* 2016 (2) SA 293 (SCA) at para 29. In the end I need not address these matters, as in the *Jordaan* judgment referred to above, the Constitutional Court held in paragraph 25<sup>17</sup> that section 118(3) of the Systems Act had all debts due by the previous owner to a municipality in mind, but these were limited by prescription to municipal taxes going back 30 years, and that the prescription period with regard to other municipal charges is limited to three years.

[29] A similar conclusion was earlier drawn in a full bench decision, *Buttertum Property Letting (Pty) Ltd v Dihlabeng Local Municipality* [2016] 4 All SA 895 (FB) at para 39.<sup>18</sup> In this division a judgment about a dispute about municipal service

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<sup>17</sup> Footnotes omitted: “[25] Section 118(3) took effect on 1 March 2001. Against the background of its predecessors, its enactment appeared to signal a radical departure. This is because the provision, though in the same section of the statute, evinces no express link with the embargo in the earlier subsection. This has the consequence, first, as the Supreme Court of Appeal held, that the charge in ss (3) operates independently of the embargo in ss (1). This means the charge upon the property has no express retrospective time limit on the debts it covers. The two-year time limit is absent. The charge takes effect in respect of all debts owed to the municipality that have not prescribed. This may embrace the total of accumulated municipal debts, including municipal taxes going back 30 years, and other charges for three years.”

<sup>18</sup> Daffue J (Moloi J concurring).

At para [39] of the judgment “Rates are levied on all rateable property within a municipality’s area of jurisdiction and these rates are levied in accordance with a rates policy. See in general: Chapters 2 and 3 of the Rates Act. All rateable properties in the municipality’s jurisdiction must be valued during a general valuation to establish the market value of the properties. See Chapter 4 of the Rates Act. A rate levied by the municipality on property must be an amount in the rand on the market value of the property. See s 11(1) of the Rates Act.

charges, also earlier assumed in its reasoning that a three-year prescription period applies. See *Argent Industrial Investment (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2017 (3) SA 146 (GJ) paras 10-12. In the present matter, the applicant in its reasoning relied on *Jordaan* (referred to earlier) and on *Argent Industrial Investment*.

[30] The municipality, despite being invited by me to supplement its heads of argument, referred me to no authority or contrary argument. Under those circumstances in applying *Jordaan* and following *Buttertum* and *Argent Industrial Investment*, I find that the applicant is not liable for municipal charges (as distinct from rates) older than three years prior to date of this judgment. Therefore, the applicant is not liable for rates and service charges incurred prior to 11 March 2015 (as it was not the owner of the property), and it is not liable for other municipal service charges incurred more than three years before date of this judgment, a date in November 2018.

[31] I now turn to the relief sought.

### **Relief sought**

[32] The applicant sought the following relief:

[32.1] Prayer 1 asked for declaratory relief that the first respondent has the onus to prove its charges in relation to the consumption of water and electricity on the property under account number [...]. The applicant did not persist with prayer 1 at the hearing. I have referred earlier to the authority in point, the Euphorbia judgment;

[32.2] Prayer 2:

“2. The first respondent is ordered to credit the account for the rates credit due on account number [...] as a result of the revaluation of the property to R15 000 000.00 as at 1 January 2013 to date”;

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Rates payable in respect of rateable property qualify as a tax and in accordance with s 11 of the Prescription Act, 68 of 1969, the prescription period is 30 years. Contrary thereto the normal three year prescription period applies to debts in respect of water and electricity usage.”

The applicant appears not to have been entitled to this relief, whatever the parties had agreed. There is a process set out in the Local Government: Municipal Property Rates Act 6 of 2004 that has to be followed with regard to the publication of valuation rolls, including adjustments and updates thereto. This has not happened. Thus the municipality suggested during argument an alternate order for the municipality to explain why it has not implemented the reduced valuation. (I appreciate the suggestion on a way forward.) I have added a three-month period to the order granted, and a reference to the legislation to the suggested relief, as it does not impact thereon. The applicant must pay rates. Had a case been made out what the rates on its version on a valuation of R15 million would have been, I would have made an order that such rates be paid pending the resolution of the dispute;

[32.3] Prayer 3:

“3. The first and second respondents are ordered to remove and/or credit all charges relating to meter number [...] (“the electricity meter”) from the date of the disconnection on 5 February 2018 to the date of this order”;

On the facts of this matter, no electricity was consumed on the property after the stated date, and the applicant is entitled to relief of this nature. The municipality bore an onus to establish its charges, and made out no case that it was entitled to levy the estimated electricity charges it levied in this period;

[32.4] Prayer 4 asked for relief as to the meter reading when the electricity meter was removed. Events overtook this relief as none of these electricity charges remained in issue due to prescription;

[32.5] Prayer 5:

“5. The first and second respondents are ordered to reconnect the electricity supply to the property within 24 (twenty-four) hours of the date of this order”;

If the municipality seeks to withhold supply due to non-payment of electricity. On the facts of this matter, all validly charged electricity charges, if any prior to date of disconnection, has prescribed. The municipality's estimated charges thereafter had no basis in fact. The applicant is entitled to electricity supply to the property, and even if there once was a valid reason for the disconnection (I make no such finding), that basis has fallen away;

[32.6] Prayers 6, 7, 8 and 9:

"6. The first and third respondents are ordered to provide the written report of the investigation conducted by the first and third respondent in testing the water meter with meter number [...] ("the water meter");

"7. The first and second respondents are ordered to produce the job cards evidencing the meter readings of the water and electricity meters taken by the first, second and third respondents from the date of transfer of the property to the applicant to the date of this order";

"8. The first respondent is ordered to explain in the form of a written report how each calculation of the applicant's account in respect of water and electricity is derived in answer to the applicant's query number 8003942602 and in compliance with section 11 of its Credit Control and Debt Collection Bylaws supported by documentary evidence which shall include:

8.1 The job card evidencing the start and end meter reading of the water and electricity meter for every month since the property had been transferred to the applicant to the date of this order;

8.2 The tariff applied to the consumption on the property relating to the electricity and water and sewerage charges";

"9. The documents required in respect of prayer 4; 6; 7 and 8 must be provided to the applicant's attorney of record electronically via email at [kaveer@kgt.co.za](mailto:kaveer@kgt.co.za) or by hand delivery to the applicant's attorneys'

physical address being GROUND FLOOR, ZOTOS PLACE, 37 OLD KILCULLEN ROAD, BRYANSTON within 20 (twenty) business days from the date of this order”;

Events also in part overtook this part of the relief sought, as no electricity charges remained due. Only water charges remained in issue. Unlike the case of the electricity supply that was disconnected, it appears from the annexures to the founding affidavit that a faulty stop valve prevented the cutting of all water supply. It is common cause that the water meter is faulty, but in any event only estimates of water consumption were levied in respect of, in effect, a vacant property where consumption would have been very low, if any. The municipality bore the onus to justify its estimates in this context. It did not do so. Possibly being too lenient on the municipality (but also considering any ongoing disputes that may return to court), the relief that I grant is a modification to prayers 6 to 9. The municipality gets a final opportunity to produce a rational estimate in light of the fact that the supply has not been disconnected. I took into account in formulating this relief that the applicant has not clearly stipulated what the occupancy of the property was over the last three years and what water was consumed, if any;

[32.7] Prayer 10 asked for declaratory relief that charges in relation to the consumption of water and electricity on the property in the period prior to three years from date of this order has become prescribed. The conclusion of law seemingly was common cause, as set out earlier in this judgment. The order has become superfluous and is given effect in the relief sought next;

[32.8] Prayer 11:

“11. The first, second and third respondents are ordered to credit and/or remove all charges for water and electricity which are older than three years from the account”;

The applicant is entitled to relief of this nature due to prescription, for the reasons already given;

[32.9] Prayers 12, 13, 14 and 15:

“12. That the first, second and third respondents (under or through them) are interdicted and restrained from terminating the supply of basic municipal services to the property, based on disputed amounts allegedly accruing during the period up until the date of this order, and which dispute is captured in respect of the aforesaid query number”;

“13. The above interdict does not affect the first, second and third respondents’ rights to terminate municipal supply to the property, in respect of amounts accruing from municipal consumption at the property after the date of this order and falling outside the ambit of the above reference number”;

“14. The above interdict shall remain operative pending the exhaustion of the first respondents’ internal dispute resolution proceedings inclusive of its/their appeal proceedings in respect of the reference numbers and should these disputes still persist thereafter, the interdict shall remain operative pending the finalization of legal proceedings to be instituted within 20 days after the exhaustion of the internal remedy procedures as aforesaid”;

“15. Should legal proceedings not be instituted within the 20-day period referred to in the preceding paragraph, the interdict shall lapse”;

This relief was not really opposed at the hearing. The applicant meets the criteria for an interim interdict pending the resolution of the dispute that preceded this application. It has a prima facie right to electricity and water supply, it has a well-grounded apprehension of irreparable harm if the interim relief is not granted (seen against the conduct of the municipality in this matter) and the ultimate relief is eventually granted, it has no other satisfactory remedy (seen against the conduct of the municipality in this matter), and the balance of convenience is in favour of the granting of the interim relief. The interdict sought is an interim interdict and I made this clear in the order granted. Two matter remains unresolved. Clearly the municipality, if it provides water and electricity to the property, must be paid

for those services. The submission made was that the applicant must continue to pay average monthly estimates whilst the dispute is resolved. No such case has been made out, but in any event I can see no reason why metered charges should not be billed;

[32.10] Prayer 16:

“The first, second, third and fourth respondents shall pay the costs of this application on the attorney-and-client scale, the one paying the other to be absolved.”

A judgment referred to earlier, *Njongi*, at para 91, confirms that objectionable conduct by the state is a basis for penalising costs. I agree that such penalising relief must remain extraordinary relief. See further *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at paras 221-225. In my view, this litigation was avoidable, wasteful litigation. It would be unfair and unjust if the applicant would be left out of pocket in respect of its legal expenses. My costs order includes all costs in this matter, inclusive of all reserved costs as it was not due to the fault of the applicant that the matter had to be re-argued before a different judge. Similarly, the respondent must bear all costs occasioned by its attempt to supplement its answering affidavit.

Wherefore I make the following order:

1. The first and second respondents are ordered to remove and/or credit within one month from the date of this order all charges on its accounting system relating to electricity meter number [...] (*“the electricity meter”*) from the date of the disconnection thereof on 5 February 2018 to the date of this order;
2. The first and second respondents are ordered to reconnect the electricity supply to Portion 1 of Erf [...] Cyrildene (*“the property”*), within twenty-four hours of the date of this order;



3. The first and third respondents are ordered to remove and/or credit within 1 (one) month from the date of this order all charges on its accounting system relating to water meter number [...] (*“the water meter”*) which precede the date of this order by more than three years;

4. Should the first and/or third respondents contend that that applicant is liable for estimated water consumption at the property in the three years preceding the date this order, then in such event, the first and third respondents are ordered to explain within one month from the date of this order in the form of a written report how each calculation of water consumption charges on the applicant's account in respect of water is derived in answer to the applicant's query number 8003942602, supported by documentary evidence;

5. Should the first and/or third respondents contend that water meter number [...] (*“the water meter”*) measures water consumption correctly and has done so in the three years preceding the date this order, then in such event-

a. The first and third respondents are ordered within one month from date of this order to provide the applicant with a written report of any investigation conducted by the first and third respondent in testing the water meter;

b. The first and third respondents are ordered to produce the documents evidencing any meter readings of the water meter by the first and third respondents for the three years preceding the date this order;

c. The first and third respondents are ordered to explain within one month from the date of this order in the form of a written report how each calculation of water consumption charges on the applicant's account in respect of water consumption for the three years preceding the date this order is derived in answer to the applicant's query number 8003942602, supported by documentary evidence which shall include:

i. The job card evidencing the start and end meter reading of the water meter for every month for the three years preceding the date this order;

ii. The tariff applied to the consumption of water on the property relating to water and sewerage charges;

6. The first respondent is ordered to consider the value of the property (and any properties jointly valued with it) and to give written reasons within three months from date of this order why the value of the property (and any properties jointly valued with it) should not be reduced to R15 million with effect from 1 January 2013 to date of this order;

7. The documents required in respect of paragraphs 4, 5 and 6 must be provided to the applicant's attorney of record electronically via email at kaveer@kgt.co.za or by hand delivery to the applicant's attorneys' physical address being Ground Floor, Zotos Place, 37 Old Kilcullen Road, Bryanston (or to such other physical address in Johannesburg or e-mail address given notice of in writing);

8. The first, second and third respondents are interdicted and restrained from terminating the supply of basic municipal services (including the supply of water, sewerage services, refuse removal services, and electricity) to the property, based on amounts allegedly accruing during the period up until the date of this order, and which dispute is captured in respect of the applicant's query number 8003942602;

9. The above interdict shall remain operative pending the exhaustion of the first respondents' internal dispute resolution proceedings inclusive of its/their appeal proceedings in respect of the applicant's query number 8003942602 and should these disputes still persist thereafter, the interdict shall remain operative pending the finalisation of legal proceedings to be instituted by the applicant within twenty days after the exhaustion of the internal remedy procedures as aforesaid. Should such legal proceedings not be instituted within the 20-day period, the interdict shall lapse;

10. The above interdict does not affect the first, second and third respondents' rights to terminate municipal supply of basic municipal services to the property, in respect of amounts accruing from municipal consumption at the property after the date of this order and falling outside the ambit of the applicant's query number 8003942602, or to terminate municipal supply of basic municipal services to the property in terms of a court order;

11. The first, second, and third respondents shall pay the costs of this application on the attorney-and-client scale, jointly and severally, the one paying the other to be absolved. Such costs are to include all reserved costs and the costs occasioned by the first, second, and third respondents' application to supplement the answering affidavit.

DP de Villiers AJ

Heard on: 6 August 2021

Delivered on: 9 November 2021 by uploading on CaseLines

On behalf of the Applicant:

Adv C van der Merwe

Instructed by

KG Tserkezis Inc

On behalf of the First, Second and

Third Respondents:

Adv Q M Dzimba

Instructed by

Madhlopa & Thenga Inc.